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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1373 127

STANDARD LIME AND STONE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The Petitioner, Standard Lime and Stone Company, a Maryland Corporation, prays that a writ of certiorari issue to review the order or decree of the Circuit Court of Appeals for the Fourth Circuit entered on May 11, 1945, for the enforcement of the order of the National Labor Relations Board, dated July 13, 1945, directing Petitioner to bargain collectively with United Cement, Lime and Gypsum Workers International Union, A. F. of L., etc.

OPINIONS BELOW.

The opinion of the Court below, filed May 11, 1945, is not yet reported, but is included in the record (R. 45). The decision and order of the National Labor Relations Board, dated July 13, 1944, is included in the record at R. 1-17.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 [28 U. S. C., Sec. 347 (a)], as authorized by Section 10 (e) of the National Labor Relations Act [49 Stat. 449, 29 U. S. C., Sec. 160 (e)].

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed May 11, 1945; its order or decree was entered May 11, 1945. Application for a stay pending application in this Court for writ of certiorari was made May 22, 1945, and the order granting the stay for 30 days pending the application for writ of certiorari in this Court was entered May 24, 1945.

QUESTIONS PRESENTED.

The Circuit Court could properly order enforcement of the Board's order directing Petitioner to bargain collectively with the A. F. of L. Union provided that Union had been properly certified by the Board, under Section 9 (a) of the National Labor Relations Act, as the exclusive bargaining agent of its employees. The question is whether or not the Board's certification of the Union was lawful and proper.

In this connection, Petitioner now asks this Court to consider the following questions, all of which were decided adversely to Petitioner's contention by the Circuit Court of Appeals and the Board:

1. Does Section 9 (a) of the National Labor Relations Act [29 U. S. C., Sec. 159 (a)], providing that "Representatives designated or selected * * * by the majority of the employees * * * shall be the exclusive representatives of all the employees," permit the Board to certify a union as exclusive bargaining agent when at the election held by the Board less than a majority of the employees cast ballots or participated in the election?

2. If Section 9 (a) does not prohibit certification in such cases, can the Board certify solely on the basis of the majority vote of the minority participating in the election, or must not the Board have before it additional evidence sufficient to justify a finding that the minority vote was, in fact, truly representative?

3. Where the Board holds an election with each of two unions and "Neither" on the ballot, with the result that neither of the unions nor "Neither" receives a majority of the votes cast, with "Neither" running third; and the Board eliminates "Neither" from the ballot and holds a so called "run off" election between the two unions, does the Board's elimination of "Neither" from the ballot make the second election, and the Board's certification of the union based thereon, invalid?

SUMMARY STATEMENT.

On April 13, 1943, the Board conducted a secret ballot election among Petitioner's maintenance and production employees to determine their exclusive bargaining agent (R. 34). At this first election, there were three places on the ballot: (1) the United Cement, Lime and Gypsum Workers International Union, A. F. of L., (2) United Construction Workers, Division of District 50, U. M. W., Local 202, and (3) "Neither." 439 employees were

eligible to vote in the election, and all of them appeared on the eligibility list posted throughout the plant. 218 cast ballots; no one received a majority of the votes cast, and "Neither" ran third, as follows:

A. F. of L.	99
U. M. W.	62
"Neither"	57
	218

(R. 20-24)

On May 13, 1943 the Board held a second or so called "run off" election at the instance of both labor organizations (R. 21; Bd. Exh. 2-J; Bd. Exh. 2-K). The Board eliminated "Neither" from the ballot at the second election, and the vote was between the A. F. of L. Union and U. M. W. (R. 21, 35-6; Bd. Exh. 2-N).

At this second election, there were 409 eligible voters, and all of them appeared on the eligibility list posted throughout the plant. 166 ballots were cast, as follows:

A. F. L. Union	137
U. M. W.	28
Void	1
	166

(R. 22, 37)

Thus, only 33.7% of the employees entitled to vote voted for the A. F. of L., and only 40% participated in the election. Nevertheless, on June 1, 1943, the Board certified the A. F. of L. Union as the exclusive bargaining representative (R. 37-9; 50 N. L. R. B. 34).

The Board certified the A. F. of L. Union entirely on the basis of the fact that, in its opinion, Section 9 (a) of the Act was properly construed to adopt a principle of minority participation, i. e., that a majority of a minority

can elect (R. 38). The record discloses no facts or evidence upon which to base a finding or conclusion that the minority vote polled at the election was representative of the wishes of the majority. This fact and its importance is discussed at pp. 6-7 below and at pp. 17-8 of our Brief.

In September, 1943, the A. F. of L. Union asked Petitioner to negotiate, but Petitioner refused, contending that the action of the Board in certifying the A. F. of L. Union was illegal (R. 23-4; Bd. Exhs. 3-A, 3-G). The A. F. of L. Union claimed that Petitioners refusal to bargain was "an unfair labor practice," and was upheld by the Board (R. 1-17, 25). On July 13, 1944, the Board ordered Petitioner, upon request, to bargain with the A. F. of L. Union (R. 3-4). Upon failure of Petitioner so to do, the Board petitioned the Circuit Court for the enforcement of its aforesaid order, and by its order and opinion hereinabove referred to, the Circuit Court has ordered enforcement of the Board's order (R. 53).

REASONS FOR GRANTING THIS PETITION.

The Circuit Court of Appeals for the Fourth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.

Section 9 (a) of the National Labor Relations Act should not be construed, as held below, to permit a majority of a minority to elect. Our Brief shows that the statutory language and the authorities do not permit that construction; and that if they did, it would only be in cases where there was some evidence to support a finding that the minority vote was in fact truly representative. But the Circuit Court below, arbitrarily and without any basis for so doing, held that the "conclusive answer" in the case now presented was this Court's decision in *Virginian Railway v. System Federation,* 84 F. (2d) 641

(C. C. A. 4th 1936), *aff'd.*, 300 U. S. 515 (1937) where this Court construed the differently worded election provision of the prior Railway Labor Act in a case where the majority participated.

This Court has never been asked to consider a case like that now presented, although this Court has denied certiorari in several cases where only a minority participated in the vote.

The record in those cases contained evidence, in addition to the election tally, upon which a finding could be based that the minority vote was in fact truly representative; that additional evidence in *New York Handkerchief Manufacturing Co. v. N. L. R. B.*, 114 F. (2d) 144 (C. C. A. 7th 1940), *cert. den.*, 311 U. S. 704, and in *N. L. R. B. v. National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7th 1943), *cert. den.*, 320 U. S. 753, was that the Company had interferred with the election and prevented employees from voting; that additional evidence in *N. L. R. B. v. Central Dispensary and Emergency Hospital*, 145 F. (2d) 852 (Ct. of App. D. of C. 1944, *cert. den.*, 65 S. C. 684, was the high rate of turnover among the employees, making it probable that those voting, although not a majority of those included on the eligibility list, were actually a majority of those entitled to vote at the time of the election.

In the case now presented, the record contains no evidence to support a finding that the minority vote polled at the election was representative of the wishes of the majority.

A second important question of federal law arises from the Board's elimination of "Neither" from the ballot at the second or run off election. In so doing, the Board made a decision for the employees which the employees were there to decide for themselves, and which, as a part of any fair election process, should have been submitted to the employees.

The Board's elimination of "Neither" from the ballot disregarded the fact that, because of an elected union's power by a closed shop agreement to force members of a rival union to change affiliation, supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. The employees should have been permitted to decide at the ballot box whether they preferred "Neither" to a run off vote later between the two unions. The statute contemplates an election by the employees, not an election partly by the Board.

Also there is a conflict between the Fourth Circuit's decision below and the decisions by other Circuit Courts of Appeals. See *New York Handkerchief Manufacturing Co. v. N. L. R. B.*, 114 F. (2d) 144 (C. C. A. 7th 1940); *N. L. R. B. v. National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7th 1943; *N. L. R. B. v. Central Dispensary and Emergency Hospital*, 145 F. (2d) 852 (Ct. of App. D. of C. 1944).

As more fully shown in our Brief, pp. 14-18, these cases, in which certification was approved where only a minority participated in the vote, required additional evidence before the Board, over and above the election tally, upon which it might base a finding that the small participation in the election was nevertheless actually representative. The Fourth Circuit in Petitioner's case, however, found no necessity for any such additional evidence, and approved the Board's certification based solely upon the minority vote.

See also, *N. L. R. B. v. Whittier Mills*, 111 F. (2d) 474 (C. C. A. 5th, 1940), requiring majority participation in the vote.

In conclusion, the decision below interpreting an important statute of the United States reaches an unsound and undesirable result, is in conflict with decisions of the

Fifth and Seventh Circuits and of the Court of Appeals for the District of Columbia; and the determination of the questions presented to this Court will settle the law and remove the uncertainty.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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